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No. 88-1434

IN THE

Supreme Court of the United States

October Term, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF LAWTON CHILES AS *AMICUS CURIAE*

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June 29, 1989

CASILLAS PRESS INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20006

25pp

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INTEREST OF THE *AMICUS CURIAE*

As a member of the United States Senate, Amicus Lawton Chiles was the Senate sponsor and an author of the Paperwork Reduction Act of 1980 (PRA), as well as the Senate sponsor of amendments to the Act contained in the Paperwork Reduction Reauthorization Act of 1986.

As the principal architect of the PRA, I have a particular interest in the proper interpretation of that law by the courts. In that regard, I submit that the Third Circuit fundamentally misread the Act, and misconstrued its statutory scheme when it held that

> any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

United Steelworkers of America v. Pendergrass, 855 F.2d 108, 112 (3d Cir. 1988).

I respectfully disagree with this holding of the lower court. Unless overturned by this Court, important means established by Congress to achieve the fundamental public - purposes of the Paperwork Reduction Act will be eviscerated and rendered meaningless.

Amicus will principally focus on the legislative history of the PRA because of his unique perspective as sponsor of the law which is being interpreted. As this

Court said in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951), "It is the sponsors that we look to when the meaning of the statutory words is in doubt."

SUMMARY OF ARGUMENT

1. The Third Circuit opinion ignores the language of the statute and applicable legislative history. The Senate and the House of Representatives explicitly considered whether collection and maintenance of information for disclosure by one private party to another (or to the public as a whole) required by regulation should be subject to the Act, and decided that it should.

2. In focusing on 44 U.S.C. §§ 3504(a) and 3518(e), the Third Circuit ignored the design of the statute as a whole. The Third Circuit's alternative holding that "any rulemaking activity" by an agency falls outside the final review authority of the Director of OMB if it "embodies substantive policy decision making entrusted to the other agency" renders the Act meaningless. Federal agencies assert, and will continue to assert, that every rulemaking activity embodies substantive policy decisions entrusted to them. If the converse were so, they would have no basis to issue a rule. Congress did not intend that rulemaking activities involving information collection requests be insulated from either the Director of OMB's review required by Sections 3507 and 3508, the public notice and participation requirements of Section 3507, or the public protection provision afforded by Section 3512 of the Act.

ARGUMENT

I. THE LOWER COURT MISREAD THE PLAIN MEANING OF THE STATUTE AND THE APPLICABLE LEGISLATIVE HISTORY.

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S.L.W.___ (June 26, 1989) slip op. at 7 (*quoting Richards v. United States*, 369 U.S. 1, 9 (1962)).

Applying these basic principles of statutory construction to the statute and facts in the case at bar leads to the inescapable conclusion that the PRA's coverage extends to recordkeeping for the benefit of third parties and to the agency's substantive policy decisions reflected in regulations requiring recordkeeping.

It is clear that the Paperwork Reduction Act covers "recordkeeping." 44 U.S.C. §§ 3502(4), (11). We in Congress specifically defined the term "recordkeeping" to mean a "requirement imposed by an agency on persons to maintain specified records." 44 U.S.C. § 3502(17). On its face, then, this definition contemplates a federally sponsored requirement which entails maintaining information for public, third party, or other disclosure purposes.

The notion that PRA covers only information which must eventually go to the government is a crabbed reading of the statute. To the contrary, the legislative history demonstrates just the opposite. This "definition

[of "recordkeeping"] includes information maintained by persons which may be *but is not necessarily provided to* a Federal agency." S. Rep. No. 96-930, 96th Cong., 2d Sess. 40 (1980).

Had the Third Circuit properly reviewed the legislative history of PRA, that court would have discovered explicit consideration of whether regulations which require persons to disclose information to third parties should be covered by the clearance requirements of the Act. Both the House and Senate spoke directly to this precise issue.

In 1973, the Congress amended the Federal Reports Act of 1942 and gave the General Accounting Office (GAO) the clearance authority previously held by the Director of the Office of Management and Budget (OMB) for information collected by the independent regulatory agencies. (Pub. L. 93-153, § 409). The Comptroller was frustrated in his efforts to perform his clearance responsibilities because several agencies resisted the GAO's efforts by asserting, among other things, that disclosure requirements to third parties were not covered by the Federal Reports Act definition of "information". (*See* Federal Reports Act of 1942, 44 U.S.C. § 3502 (1976)).

In a report to Congress in 1976, the Comptroller commented:

> Two agencies, the Securities and Exhange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), believe that only a small number of their information-gathering activities are subject to the Federal Reports Act.
>
> SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsiblities involve the "disclosure" of information to the public rather than

collection activities, and accordingly, are not subject to that provision. The SEC contends that, in contrast to other Government agencies which solicit information for their own purposes, SEC serves as a conduit through which information is disclosed to investors pursuant to Federal securities laws.

* * *

The underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities. We disagree with the position of SEC and CFTC and are currently working with these agencies to resolve the issue.

Report to the Congress by the Comptroller General of the United States, "Status of GAO's Responsibilities Under the Federal Reports Act", OSP-76-14, May 28, 1976, at 15-16.

The Comptroller recommended that Congress clarify and strengthen the Federal Reports Act "to allow the clearance agency to challenge the need for regulatory information." *Id.* at 20.

In 1974, the Congress established the Commission on Federal Paperwork. Pub. L. No. 93-556, 93d Congress, 88 Stat. 1789. "The legislation was the result of congressional concern that the Federal Reports Act of 1942 was not effective in limiting the Federal paperwork burden." *See*, Legislative Digest Section, Office of the General Counsel, United States General Accounting Office, "Legislative History of the Commission on Federal Paperwork," at iii. Since the Comptroller General and the Director of OMB were statutory members of the Commission, the issue of whether disclosure requirements to third parties should be covered by the clearance process was thrashed out

by those entities which had a direct role in implementing the statute. *See* "The Reports Clearance Process", A Report of the Commission on Federal Paperwork 43 (1977).

The Commission on Federal Paperwork noted:

> The Act is not clear on its coverage of a major portion of the paperwork burden--recordkeeping requirements--although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines....Not all agencies covered by the Federal Reports Act comply fully with its requirements.
>
> For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance.

Id. at 1.

In June of 1978, when I held Senate hearings on efforts to reduce federal paperwork burdens, the Comptroller General brought his views and that of the

Paperwork Commission to my attention. *Efforts to Reduce Federal Paperwork Burdens: Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate,* 95th Cong., 2d Sess. 45 (1978). The term "recordkeeping" was incorporated in the definition of "collection of information" in S. 1411, the bill I introduced in June 1979.[1] Congressmen Brooks and Horton (who was a Chairman of the Paperwork Commission) introduced H.R. 6410, a House companion to S. 1411 in February of 1980.[2] When the Comptroller General testified before them, he noted that their bill included his recommendations to resolve the problems he and the Paperwork Commission had identified with the clearance process.

> Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements are specifically included in the reports clearance process.
>
> * * *
>
> The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these

[1]For the text of S. 1411, see *Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate,* 96th Cong. 1st Sess. 89 (1979).

[2]For the text of H.R. 6410, see *Paperwork Reduction Act of 1980: Hearings before a Subcommittee on Government Operations, House of Representatives,* 96th Cong. 2d Sess. 3 (1980).

efforts.[3]

The House Committee gathered statements from the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Reserve System, and the Securities and Exchange Commission, all of which raised concerns relating to the proposed changes to the Reports Act. *Id.* at 313-36.

The SEC, for example, commented as follows:

> This expansion of the scope of the Federal Reports Act is of major concern to us. We do not think the purpose of the Bill is, or should be, to subject the Commission's disclosure and enforcement efforts to oversight by the Office of Management and Budget. We do not believe, for example, that OMB should determine whether information about possible selfdealing between corporate officers and the company ought to be disclosed in a proxy statement. The definition of "collection of information" is so broad, however, that it could be read as encompassing this information, which is collected on standard, statutorily authorized forms.

Id. at 331.

On the Senate side, I held hearings in November of 1979 and invited the SEC and FCC to testify publicly on their concerns, since the Senate bill also incorporated the term "recordkeeping" in the definition of "collection of information" and "information collection requests". Commissioner Evans of the SEC and Commissioner Brown of the FCC expressed concerns similar to ones

[3]*Id.* at 39.

raised in the House over the breadth of the term "collection of information." I responded in part:

> Well, we are delighted to get that best advice and that is the reason for this hearing, to get your concerns about it.... Yet, when we go out into the countryside, when we go out and listen to people, they do not feel anybody is doing a good job, the Congress, the executive branch, the independent regulatory agencies, or anyone. They are demanding that something be done. So, again, we are talking about weighing something here. We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can review and that the people can hold accountable, and that we can say we are trying to get a handle on.

Paperwork and Redtape Reduction Act of 1979: Hearings on S. 1411, 96th Cong. 1st Sess. 87 (1979).

The Congress deliberately adopted the definition of recordkeeping that had been recommended to it by the Comptroller General and the Paperwork Commission. Both the Senate and House Reports spoke directly to the point of whether disclosure requirements were to be covered by the Act's requirements.

> Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other

persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 39-40 (1980).

The House Report expressed a similar view:

> The definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts.
>
> * * *
>
> The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory

> information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410. (*Id.* at 23).

H.R. No. 96-835, 96th Cong. 2d Sess. 19-23 (1980).

As the Senate floor manager to the Paperwork Reduction Act, I reiterated the Act's broad coverage and application to federally sponsored collections of information when the full Senate unanimously consented to pass the legislation.

> Today many Federal programs attempt to serve large numbers of people in a variety of ways, such as protecting civil rights, providing decent housing and insuring safe and healthy working conditions.
>
> In those and other areas, Congress has made critically important commitments to the people of this Nation. In order to be effective, many of those programs must collect information from the public in order to make intelligent decisions on standards, benefits, and other Government actions. In other cases, information must be collected in order *to inform the public* of various matters of general concern.
>
> The Paperwork Reduction Act has a twofold objective. First, it will insure that agencies make only necessary--and I underline that, Mr. President, necessary--information requests of the public. And second, those burdens which are found to be unnecessary and wasteful will be eliminated.

126 Cong. Rec. S14686 (November 19, 1980) (emphasis added).

During the signing ceremony for the Act, President Carter commented similarly to those of us who were in attendance and had worked to shape the legislation.

> The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It *also* ensures that the public need not fill out forms *nor keep records* which are not previously approved by OMB.

Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795 (emphasis added).

The applicable legislative history thus reveals that we in the Congress and the President[4] contemplated that disclosure requirements promulgated by the federal agencies would fall under the accountability requirements of the statute.

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[4]*See Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969) (relying in part on President Truman's signing statement to hold that the Portal-to-Portal Act required an objective rather than subjective test for good faith).

II. THE THIRD CIRCUIT IGNORES THE STATUTORY SCHEME OF THE ACT

The Paperwork Reduction Act, as a re-codifiction and expansion of the Federal Reports Act of 1942, is deliberately structured as a coordinated whole, with its various provisions building upon and reinforcing each other. Agencies are required to justify their need for a recordkeeping requirement and submit their proposal to the Office of Management and Budget. The public is to have early and meaningful opportunity to comment as part of the review process. As the ultimate sanction and public protection, if an agency fails to participate in the statute's review process, or fails to display a current control number, then, "[n]otwithstanding any other provision of law," the public is not subject "to any penalty for failing to maintain" information. 44 U.S.C. § 3512.

In this context, the Ninth Circuit opinion in *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989) is instructive. In *Smith*, the Ninth Circuit was faced with determining whether a Forest Service regulation, promulgated pursuant to the agency's statutory mission, entailed a "information collection request" within the meaning of the Paperwork Reduction Act. The Court ruled the regulation did constitute an information collection request, and that since it did not display a current OMB control number, as required by section 3512 of the Act, the criminal convictions had to be reversed.

In acknowledging the statutory scheme underpinning the Paperwork Reduction Act which culminates in the public protection section, (44 U.S.C. § 3512) the Ninth Circuit recognized that an agency engaged in enforcing criminal sanctions of its substantive programs was not relieved from its responsibilities under the Paperwork Reduction Act. The Court thereby affirmed a

fundamental premise of the Paperwork Reduction Act that every person is entitled to be assured that their government has checked the need for information before it asks them to provide or maintain information.

While the regulation in question in *Smith* required a person to provide information to the government, the case is important here because the regulation in *Smith* requiring a permit and the pursuit of criminal sanctions by the agency for a failure to obtain the permit certainly embodies substantive policy decision making. Yet the Third Circuit's reading of the two provisions of the Act -- § 3504(a) and § 3518(e) -- in isolation rather than as part of the Act as a whole, alternatively held that if an agency activity involving the collection of information involves "substantive policy decision making," it is relieved from its responsibilities under the Paperwork Reduction Act to submit its proposals to the Director and the public for review. 855 F.2d at 112. This narrow reading of the PRA is contrary to the decisions in *Smith* and *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849), as well as violative of the principle of statutory construction that the provisions of a statute should be read in harmony with the entire statutory scheme. *See K mart Corp. v. Cartier, Inc.*, 108 S.Ct. 1811 (1988).

The Third Circuit's interpretation of the PRA wrongly excludes substantive policymaking from PRA's coverage. Federal agencies assert, and will continue to assert that every rulemaking activity embodies substantive policy decisions entrusted to them. If the converse were so, they would have no reason to issue a rule in the first place. The Third Circuit opinion would thus permit the whole of rulemaking activities involving information collection requests of the public to escape all the accountability requirements of the Act, whether or not the information goes to the government. Such a

sweeping exemption would render the PRA a nullity and would assume Congress wore blinders in enacting the PRA.

The legislative history demonstrates vividly that we in Congress were well aware that agency proposals for the collection of information involve and embody substantive policy decisions. The Senate Report stated:

> In both hearings on S. 1411 and letters received by the Committee, representatives of the independent regulatory agencies argued that their agencies autonomy would be adversely affected by a transfer back to OMB to due the difficulties of separating information management from substantive agency policymaking. They argued that information management may require a balancing of competing interests--such as societal needs, the burden on the public, privacy, and budget impact--all of which could touch upon the substance of policy.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 14.

Similarly, the House Report noted:

> The Committee agrees with both FCC and SEC as to the close relationship between policymaking and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes.

H. Rep. No. 96-835, 96th Cong., 2d Sess., at 23.

But Congress envisioned an oversight role for itself over any abuse by OMB. As the Senate Report stated:

> The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

S. Rep. No. 96-930, 96th Cong., 2d Sess. at 16.

I also want to bring to the Court's attention that several of the Congressional sponsors of the Paperwork Reduction Act were present in the White House on November 30, 1979 when President Carter signed Executive Order 12174 on Federal Paperwork Reduction. On this occasion the President, based on his Constitutional authority to take care the laws be faithfully executed, established procedures directing the Director of OMB to review recordkeeping requirements imposed upon the public by executive branch agencies. *See* Preamble and Section 1-101 of Executive Order No. 12174.

Among other purposes, the Congressional sponsors, who witnessed President Carter's signing of this Executive Order, intended the impending Paperwork Reduction Act both to make the President's assertion of executive authority a matter of statutory law and to extend the clearance process to independent regulatory agencies. That was the understanding of the day. *See* Presidential Documents, Administration of Jimmy Carter, November 30, 1979, at 2176-82.

The Third Circuit's narrowing of the coverage of the Paperwork Reduction Act would not only do violence to the substantive provisions of the PRA, it would also amount to a *decreasing* of the President's authority previously acknowledged in Executive Order No. 12174.

Such a consequence is expressly prohibited by the provisions of Section 3518(e):

> Nothing in this Chapter *shall be interpreted* as increasing or *decreasing* the authority of the President..., under the laws of the United States, with respect to the substantive policies and programs of departments....(emphasis added).

Given the statutory scheme, the Paperwork Reduction Act should not be interpreted to "insulate" the Director of OMB *or the agencies* from undertaking procedural and substantive responsibilities the President could otherwise direct them to do under his inherent Constitutional authority, especially where, as here, the agency involved is a Cabinet level agency as opposed to an "independent" regulatory agency.

CONCLUSION

As I noted when Congress amended the Paperwork Reduction Act in 1986:

> A fundamental premise of the Paperwork Reduction Act is that every citizen is entitled to have their Government check the need for information requests made of them....
>
> The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." Exemptions to this coverage, either by agency or by class of information were specifically set out in the definitions of section 3502 or the savings provisions of section 3518. The notion the law was dedicated primarily to "forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and

> disclosure requirements which are means to carry out federally "sponsored collections of information" is a fundamental misreading of what the law states, what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1986....

132 Cong. Rec. 16740 (1986) (Statement of Sen. Chiles upon Senate passage of the Paperwork Reduction and Reauthorization Act of 1986).[5]

The lower court opinion interprets the Paperwork Reduction Act in a way directly contrary to the plain meaning of the statute and the understanding of the Senate and House of Representatives when they enacted the statute in 1980 and amended it in 1986.

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[5]During hearings on the amendments to the Paperwork Reduction Act in April of 1984, Respondent Public Citizen urged Congress "to make it absolutely clear, once and for all," that disclosure requirements "have nothing to do with the Paperwork Reduction Act of 1980 or this year's amendments." *Paperwork Reduction Act Amendments of 1984: Hearing before the Subcomm. on Information and Management and Regulatory Affairs of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 238 (1984). As my statement in 1986 observed, Congress rejected this notion not only in 1986, but in 1984 and 1980 as well. *See* S. Rep. 98-576, 98th Cong., 2d Sess. at 43. Respondent Public Citizen now finds itself before this Court seeking a judicial remedy for what Congress specifically chose not to do.

For these reasons, Amicus urges the Court to reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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June 29, 1989